

STATE OF MICHIGAN  
COURT OF APPEALS

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MARY ANN MORSMAN,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS,

Defendant-Appellee.

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UNPUBLISHED

February 23, 1999

No. 203716

Kent Circuit Court

LC No. 94-2216-NO

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

This is a personal injury case based on defendant's duty to maintain the roadway. MCL 691.1402(1); MSA 3.996(102)(1). We initially denied plaintiff's delayed application for leave to appeal from an order granting summary disposition to defendant on the basis of plaintiff's delay in filing a notice of injury. On remand from the Supreme Court, we review this case as if on leave granted and now affirm.

Plaintiff alleges that she broke her ankle on January 8, 1993, when she stepped into a broken section of curbing along Lake Michigan Drive in Grand Rapids. She notified defendant of the incident and injury on November 17, 1993, 313 days after the accident. The curb had been repaired sometime between April 24 and August 24, 1993. Defendant moved for summary disposition under MCR 2.116(C)(7), claiming that (1) plaintiff's failure to timely notify it of the incident and injury had prejudiced defendant's ability to defend itself, and that (2) the curb was not part of the "highway" for purposes of determining governmental immunity. The court granted the motion for summary disposition on the first ground, and expressly declined to rule on the second ground.

We review a ruling on a motion for summary disposition de novo. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). A motion under "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Glancy, supra*, 457 Mich at 583 (quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992)).

As a condition of recovery for any injuries caused by a defective highway, an injured person must notify the governmental agency of the injury and alleged defect within 120 days. MCL 691.1404(1); MSA 3.996(104)(1). The deadline is not absolute, however. An injured person who does not timely notify the governmental agency may bring an action unless the agency can show “actual prejudice” resulting from the delay. *Brown v Manistee Co Rd Comm*, 452 Mich 354, 366, 368-369; 550 NW2d 215 (1996) (reaffirming *Hobbs v State Hwy Dep’t*, 398 Mich 90, 96; 247 NW2d 754 (1976)). Actual prejudice refers to “a matter which would prevent a party from having a fair trial, or [a] matter which he could not properly contest,” such as proximate cause. *Blohm v Emmet Co Rd Comm’rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997) (quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 657; 213 NW2d 134 (1973)).

Plaintiff relies on *Brown, supra*, to argue that the defendant has failed to show that it suffered actual prejudice from the delay in this case. In *Brown, supra*, 452 Mich at 368-369, the Supreme Court held that, where the defendant had paved over the alleged defect before the expiration of the 120-day notification period, it could not show that it had been prejudiced by the delay. We find *Brown* to be inapposite.

In the present case, it is undisputed that Lake Michigan Drive was repaired between April 24 and August 24, 1993. Although the first two weeks of repairs took place within the 120-day notification period, it is not clear exactly what repairs were made at that time. However, an uncontroverted affidavit by defendant’s administrative assistant shows that the repairs to the curbs and gutters -- where plaintiff claims to have fallen -- were “completed toward the end of [the four-month repair period], just before the street was resurfaced.” In addition, plaintiff herself took photographs of the area in July of 1993, well after the expiration of the 120-day period, which show that the curb was still missing. Thus, it is clear that unlike in *Brown*, the allegedly defective curb in this case was not repaired until after the expiration of the notice period. Compare *Brown, supra*, 452 Mich at 368-369. Therefore, had defendant been timely notified, it could have investigated the accident and the alleged defect before making any repairs. Compare *Blohm, supra*, 223 Mich App at 388-391 (defendant could have hired experts, reconstructed the accident, taken pictures and measurements, etc., if it had been timely notified).

In addition, we are not persuaded by plaintiff’s argument that her photographs minimized the prejudice to defendant. Although the pictures depict an area of missing curbing from several angles, they do not show whether there was a hole, the depth and configuration of any such hole, or otherwise show the area in a way that would be useful for defendant to prove its case. Compare *Blohm, supra*, 223 Mich App at 388-391 (although some evidence was collected, defendant was prejudiced because evidence was lost and a thorough investigation could no longer be conducted). Finally, plaintiff has cited no authority to support her argument that defendant has, in effect, waived its claim of actual prejudice because it did not respond to her notice for two months after it was filed. We conclude that the trial court correctly granted summary disposition on the ground of prejudicial delay.

In light of our disposition of this issue, we decline to address plaintiff’s remaining issue.

(Defendant correctly notes that this issue was not decided by the trial court as a basis for its grant of defendant's motion.)

Affirmed.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey